Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v Datuk Captain Hamzah bin Mohd Noor and another appeal

COURT OF APPEAL — CIVIL APPEAL NOS B-02–738 OF 2006 AND W-02–393 OF 2004
SURIYADI, WAN ADNAN MUHAMAD AND HELILIAH JJCA
28 AUGUST 2008

Civil Procedure — Writ of summons — Extensions of — Extensions granted twice for non-service — Appeal against — Whether extension to be made before or after expiry of writ — Whether provisions of O 6 r 7(2A) of the Rules of the High Court 1980 inconsistent with s 45 of the Interpretation Acts 1948 and 1967 — Whether respondents adduced good reasons for non-service

The judgment involves two appeals (appeal A and appeal B) heard together after the parties agreed that the general principles applicable to both appeals were similar, though the facts differed. In appeal A, the plaintiff/respondent ('respondent') filed two writs against the defendant/appellant (appellant) in respect of non-payment by the appellant to the respondent of remuneration in respect of work undertaken by him from 1994 to 1997. Although both writs were for damages for breach of contract, one was filed at the Shah Alam High Court ('the Shah Alam suit') while the other was filed at the Supreme Court of Singapore ('the Singapore suit'). The respondent had filed similar suits founded on the same cause of action to preserve his position in the event of objections taken up on matters of jurisdiction. On 22 February 2001 the respondent served the Singapore suit against the appellant but not the Shah Alam suit. On 12 March 2001, the appellant applied for a stay of the Singapore suit, which application for stay, was granted. The respondent appealed against that decision to a judge in chambers and later to the Court of Appeal. However, on 18 February 2002 the Singapore Court of Appeal dismissed the respondent's appeal against the stay of the Singapore suit. In the meantime, on 20 March 2001 the respondent applied to renew the Shah Alam suit, which had yet to be served, pursuant to O 6 r 7(2A) of the Rules of the High Court 1980 ('the RHC'). This renewal application was done prior to the expiry of the writ. Thereafter as service of the writ had yet to be effected a second renewal application was made. On 6 December 2001 the court again granted an extension on the writ as from 28 August 2001 to 27 March 2002. In effect two extensions of the writ had been granted by the court to an unserved writ. On 27 March 2002, the writ in the Shah Alam suit, now valid under the second renewal, was served on the appellant. The

appellant filed a conditional appearance on 8 April 2002. The appellant thereafter filed two applications on 20 May 2002 viz an application to strike out the endorsement to the writ and statement of claim and an application to set aside the two ex parte orders extending the validity of the writ and its purported service. It was thereupon agreed by the parties that the setting aside of the two ex parte orders extending the validity of the writ affecting the purported service would be resolved first. The senior assistant registrar who heard the setting aside application dismissed it. The appellant then appealed to the judge in chambers. In this appeal, the appellant ventilated that any order of extension regarding the validity of a writ was conditional upon unsuccessful effort being made to serve the writ within one month of its issue, with such effort deposed in the supporting affidavit. The appellant therefore submitted that the court was empowered with the discretion to grant the extension if sufficiently good reasons existed for the non-service of the writ, regardless of the expressed rules. In coming to a decision the court referred to appeal B where the judge was of the opinion that the test to be applied for considering the extensions of the writ was whether good reasons existed to excuse the delayed service and that withholding the service of the writ in order to avoid duplicity of action while waiting for a parallel case to be decided in Singapore was good reason for extending the validity of the writ. The judge thereafter dismissed the appellant's setting aside application and hence this appeal. Therefore the main issue for consideration in this appeal was whether, without the proof of effort, the court could extend the writ twice as it did.

In appeal B the plaintiff/respondent filed a writ against the defendant/appellant on 27 February 2001, in the Singapore court for payment of consultancy services purportedly rendered to the appellant. On 13 July 2001 the respondent filed a similar claim against the appellant in the Kuala Lumpur High Court but no attempt was made to serve it. The respondent in appeal B had also filed similar suits founded on the same cause of action to preserve his position in the event of objections taken up on matters of jurisdiction. On 24 January 2002, the respondent applied to extend the unserved writ under O 6 r 7(1) of the RHC, after the expiry of the writ and this application was allowed with the first extension being from 14 January 2002 to 13 July 2002. Despite the granting of this extended period no steps were taken by the respondent to serve the writ on the appellant. Thereafter the respondent applied again on 26 July 2002 to extend the unserved writ, after the expiry of the writ, and again the extension was granted from 14 July 2002 to 13 January 2003. Subsequently on 10 January 2003, the writ was served on the appellant and the latter filed a conditional appearance and thereafter applied to set aside the two earlier orders granting an extension of the writ. Unlike appeal A, the deputy registrar after hearing arguments had allowed the appellant's application. Being dissatisfied the respondent had filed an appeal against that setting aside order. Before the

judge hearing the appeal the appellant contended, inter alia, that the applications by the respondent for the extension of the writ were made out of time i.e. after the writs had expired. The judge allowed the respondent's appeal with costs in the cause and hence this appeal. The appellant had submitted in this appeal that the applications for the extensions of the writ, which involved a 12 and 13 days delay from the expiry of the writs, were made out of time ie after the expiry of the writ and therefore contrary to O 6 r 7(2A) of the RHC and that prior to the writ elapsing the respondent never made any effort to serve it on the appellant. In response the respondent submitted that the parallel action commenced in Singapore against the appellant on the same subject matter had attracted the preliminary issue of forum non conveniens raised by the appellant and justified the writ's non-service. An additional issue that arose for consideration was whether there were inconsistencies between O 6 r 7(2A) of the RHC, which required an application for renewal to be made before the expiry of the writ, and s 45 of the Interpretation Acts 1948 and 1967 ('the Act'), which requires the application for an extension to be made after the expiry of the time.

Held, dismissing both appeals with costs:

(1) (per **Suriyadi JCA**, delivering majority judgment) Having perused O 6 r 7(2A) of the RHC and s 45 of the Act it would appear that there are no inconsistencies between them. They have different roles to play, with those roles statutorily compartmentalised. Order 6 r 7(2A) of the RHC merely requires any application for an extension to be made before the expiry of the writ. Needless to say this provision is from a subordinate legislation and would be subject to the Act. Section 45 on the other hand prescribes powers of courts or of any other authority to extend time, with such powers exercisable after the expiration of the prescribed time. Section 45 is relevant as it legitimises the acts of the respective courts of appeals A and B to extend time after the expiry of the writs (see paras 31–32).

(2) (per **Suriyadi JCA**, delivering majority judgment) Order 6 r 7(2A) of the RHC is not to be read in isolation but read together with O 1A and 2 of the RHC. Having considered in totality the relevance of these provisions it is clear that justice of a case is uppermost and that the evidential requirements of O 6 r 7(2A) do not take away the court's discretion to grant an extension if there are good grounds for the non-service (see paras 40–41).

(3) (per **Suriyadi JCA**, delivering majority judgment) The need to show efforts having been made to serve the writ on the appellant in O 6 r 7(2A) when read together with O 1A of the RHC must be surplusage. It therefore becomes incumbent on the respondents of both appeals to

convince the respective courts that they have good reasons for the non-service of their respective writs on the appellant. This the respondents did by pointing out that they had postponed the service on the writs until the suits before the Singapore courts had been adjudicated in order to avoid any duplicity of action. Good grounds had been supplied by the respondents in both appeals A and B justifying the non-service of the writ (see paras 42–43).

(4) (per **Suriyadi JCA**, delivering majority judgment) In considering whether the 12 and 13 days delay, in applying for the first and second renewal applications in appeal B, were inordinate and unreasonable it is necessary to consider factors such as the length of time of the delay and reasons; the chances of success of the matter if the application was granted; and the factor of prejudice to the aggrieved party if the extension were granted. In the light of three proceedings running simultaneously and the confusing state of affairs prevailing at the time for the respondent, the 12 to 13 days delay did not qualify as inordinate. In addition O 1A of the RHC statutorily demands that justice of the case be the uppermost consideration (see paras 44–45).

(5) (per **Heliliah JCA**, dissenting) The important question to consider in this appeal was when was the court's discretion under O 6 r 7(2) of the RHC to extend the validity of the writ to be exercised. Order 6 r 7(2) is subject to O 6 r 7(2A) and therefore there must be a timeous application before the expiry of the writ before the discretion may be exercised. The discretion is to be exercised when there is before the court an application made before the expiry of the writ itself. If it were to be otherwise it would tantamount to the court permitting the party filing the application to circumvent the effect of O 6 r 7(2A) under the purported exercise of discretion pursuant to s 45 of the Act. Section 45 does not override a specific statutory provision which circumscribes the parameters of the exercise of the discretion. Thus the discretion to renew the writ could not be invoked when the application was itself out of time and with complete disregard to the statutory requirements of both O 6 r 7(2) and O 6 r 7(2A) (see paras 90–92).

(6) (per **Heliliah JCA**, dissenting) In these appeals the respondents had been permitted to unilaterally not make any effort to serve the writ on the appellants using the actions filed in Singapore as reasons not to make any effort at all. It was therefore a case of non-effort in complete disregard of the statutory requirement as opposed to making efforts and failing. As such there was a premature exercise of discretion to extend the period during which the applications ought to have been made (see para 93).

(7) (per **Heliliah JCA**, dissenting) Order 1A of the RHC is a general declaratory statement which encapsulates an underlying principle that

in the dispensation of justice there should not be heedless and rigid observance of technical rules which would not serve the ends of justice itself. It is not the object of one order in one part of the RHC 1980 to be utilised to defeat the object of introducing O 6 r 7(2A) (see para 103).

[Bahasa Malaysia summary

Penghakiman ini melibatkan dua rayuan (rayuan A dan rayuan B) yang didengar bersama selepas pihak-pihak bersetuju bahawa prinsip am yang terpakai bagi kedua-dua rayuan adalah sama walaupun berbeza fakta. Di dalam rayuan A, plaintif/responden ('responden') telah memfailkan dua writ terhadap defendan/perayu ('perayu') berkaitan dengan kegagalan pembayaran imbuhan oleh perayu kepada responden berkaitan dengan kerja-kerja yang telah dilaksanakannya dari 1994 hingga 1997. Walaupun kedua-dua writ adalah untuk ganti rugi bagi kemungkiran kontrak, satu telah difailkan di Mahkamah Tinggi Shah Alam ('guaman Shah Alam') sementara yang satu lagi telah difailkan di Mahkamah Agung Singapura ('guaman Singapura'). Responden telah memfailkan guaman yang sama berdasarkan kausa tindakan yang sama bagi mengekalkan kedudukannya dalam situasi jika bantahan ditimbulkan berkaitan dengan bidang kuasa. Pada 22 Februari 2001 responden telah menyampaikan guaman Singapura terhadap perayu tetapi bukannya guaman Shah Alam. Pada 12 Mac 2001, perayu telah memohon untuk satu penggantungan guaman Singapura yang mana permohonan untuk penggantungan telah dibenarkan. Responden telah merayu terhadap keputusan tersebut kepada hakim dalam kamar dan kemudiannya kepada Mahkamah Rayuan. Walau bagaimanapun, pada 18 Februari 2002 Mahkamah Rayuan Singapura telah menolak rayuan responden terhadap penggantungan guaman Singapura. Dalam masa yang sama, pada 20 Mac 2001 responden telah memohon untuk memperbaharui guaman Shah Alam, yang mana masih belum disampaikan, menurut A 6 k 7(2A) Kaedah-Kaedah Mahkamah Tinggi ('KMT'). Permohonan untuk memperbaharui tersebut telah dilakukan sebelum luputnya writ tersebut. Kemudiannya, oleh kerana penyampaian writ tersebut masih belum dilaksanakan permohonan yang kedua untuk memperbaharu telah dibuat. Pada 6 Disember 2001 mahkamah sekali lagi telah membenarkan lanjutan ke atas writ tersebut daripada 28 Ogos 2001 hingga 27 Mac 2002. Writ tersebut telah diberikan dua lanjutan oleh mahkamah kepada writ yang belum disampaikan. Pada 27 Mac 2002, writ di dalam guaman Shah Alam, yang sekarang sah di bawah pembaharuan kedua, telah disampaikan kepada perayu. Perayu telah memfailkan kehadiran bersyarat pada 8 April 2002. Perayu kemudiannya telah memfailkan dua permohonan pada 20 Mei 2002 iaitu permohonan untuk membatalkan pengendorsan kepada writ dan pernyataan tuntutan dan permohonan untuk mengenepikan dua perintah

ex parte yang melanjutkan keesahan writ dan penyampaian yang dimaksudkan. Adalah dipersetujui oleh pihak-pihak bahawa pengenepian dua perintah ex parte yang melanjutkan keesahan writ yang menyebabkan penyampaian yang dimaksudkan diselesaikan dahulu. Penolong kanan pendaftar yang mendengar permohonan pengenepian telah menolaknya. Perayu kemudiannya telah merayu kepada hakim di dalam kamar. Dalam rayuan ini, perayu telah menyuarakan bahawa mana-mana perintah lanjutan berkenaan dengan keesahan writ adalah bersyarat apabila usaha yang gagal dalam menyampaikan writ dalam tempoh satu bulan daripada pengeluarannya, dengan usaha tersebut dideposkan di dalam afidavit sokongan. Perayu kemudiannya menghujahkan bahawa mahkamah telah diberi kuasa dengan budi bicara untuk memberikan lanjutan jika sebab-sebab yang cukup wujud bagi ketidak penyampaian writ tersebut, tanpa menghiraukan peraturan-peraturan yang jelas. Dalam membuat keputusan, mahkamah telah merujuk kepada rayuan B di mana hakim berpendapat, ujian yang digunakan untuk mempertimbangkan lanjutan writ adalah sama ada sebab yang baik wujud untuk menjadi alasan kepada kelewatan penyampaian dan penangguhan penyampaian writ untuk mengelakkan kependuaan tindakan sementara menunggu kes yang selari diputuskan di Singapura adalah alasan yang baik untuk melanjutkan keesahan writ. Hakim kemudiannya menolak permohonan pengenepian perayu dan maka rayuan ini. Oleh yang demikian isu utama untuk dipertimbangkan di dalam rayuan ini adalah sama ada, tanpa bukti usaha, mahkamah boleh melanjutkan writ sebanyak dua kali seperti mana yang berlaku.

Dalam rayuan B plaintif/responden telah memfailkan writ terhadap defendan/perayu pada 27 Februari 2001 di mahkamah Singapura untuk pembayaran perkhidmatan perundingan yang diberikan kepada perayu. Pada 13 Julai 2001 responden telah memfailkan tuntutan yang sama terhadap perayu di Mahkamah Tinggi Kuala Lumpur tetapi tiada cubaan di buat untuk menyampaikannya. Responden di dalam rayuan B juga telah memfailkan guaman yang sama berdasarkan kausa tindakan yang sama untuk mengekalkan kedudukannya dalam situasi jika bantahan dilakukan atas perkara bidang kuasa. Pada 24 Januari 2002, responden telah memohon untuk melanjutkan writ yang tidak disampaikan di bawah A 6 k 7(1) KMT, selepas luputnya writ dan permohonan ini telah dibenarkan dengan lanjutan pertama daripada 14 Januari 2002 hingga 13 Julai 2002. Meskipun kebenaran lanjutan tempoh ini, tiada langkah diambil oleh responden untuk menyampaikan writ kepada perayu. Kemudiannya responden telah sekali lagi memohon pada 26 Julai 2002 untuk melanjutkan writ yang tidak disampaikan tersebut, selepas luputnya writ dan sekali lagi lanjutan telah dibenarkan daripada 14 Julai 2002 hingga 13 Januari 2003. Selanjutnya, pada 10 Januari 2003, writ telah disampaikan kepada perayu dan kemudiannya telah memfailkan kehadiran bersyarat dan selepas itu telah memohon untuk mengenepikan dua perintah awal yang membenarkan

A lanjutan writ. Berbeza dengan rayuan A, timbalan pendaftar selepas mendengar hujahan telah membenarkan permohonan perayu. Tidak berpuas hati, responden telah memfailkan rayuan terhadap perintah pengenepian tersebut. Di hadapan hakim yang mendengar rayuan perayu menegaskan bahawa, antara lain, permohonan oleh responden untuk lanjutan writ telah B dibuat di luar masa iaitu selepas writ luput. Hakim telah membenarkan rayuan responden dengan kos dalam kausa dan justeru itu rayuan ini. Perayu telah menghujahkan di dalam rayuan ini bahawa permohonan-permohonan untuk lanjutan writ, yang melibatkan 12 dan 13 hari kelewatan daripada luputnya writ adalah dibuat di luar masa iaitu selepas luputnya writ oleh itu C bertentangan dengan A 6 k 7(2A) KMT dan sebelum writ luput responden tidak pernah melakukan apa juga usaha untuk menyampaikannya kepada perayu. Sebagai respons, responden menghujahkan bahawa tindakan selari yang dimulakan di Singapura terhadap perayu ke atas perkara yang sama telah menarik isu awal *forum non conveniens* yang dibangkitkan oleh perayu D dan menjustifikasikan ketidak penyampaian writ. Isu tambahan yang timbul untuk dipertimbangkan adalah sama ada terdapat ketidakselarasan di antara A 6 k 7(2A) KMT, yang memerlukan permohonan untuk mempembaharui di buat sebelum luputnya writ dan s 45 Akta Tafsiran 1948 dan 1967 ('Akta'), yang memerlukan permohonan untuk lanjutan dibuat selepas luputnya E tempoh masa.

Diputuskan, menolak kedua-dua rayuan dengan kos:

F (1) (oleh **Suriyadi HMR**, menyampaikan penghakiman majoriti) Dengan meneliti A 6 k 7(2A) KMT dan s 45 Akta, ianya jelas bahawa tiada ketidakselarasan di antara keduanya. Kedua-duanya mempunyai peranan yang berbeza, dengan peranan-peranan tersebut dibahagikan secara statutori. Aturan 6 k 7(2A) KMT biasanya memerlukan G mana-mana permohonan untuk lanjutan dibuat sebelum luputnya writ. Tidak perlu dinyatakan, peruntukan ini daripada perundangan bawahan dan tertakluk kepada Akta. Seksyen 45 sebaliknya menentukan kuasa mahkamah atau mana-mana pihak berkuasa yang lain untuk lanjutan masa, dengan kuasa tersebut dilaksanakan selepas H luputnya masa yang ditetapkan. Seksyen 45 adalah relevan yang mana ianya mengesahkan tindakan mahkamah-mahkamah terlibat dalam rayuan-rayuan A dan B untuk melanjutkan masa selepas luputnya writ (lihat perenggan 31–32).

I (2) (oleh **Suriyadi HMR**, menyampaikan penghakiman majoriti) Aturan 6 k 7(2A) KMT tidak dibaca secara berasingan tetapi dibaca bersama dengan A 1A dan 2 KMT. Mempertimbangkan secara keseluruhan relevannya peruntukan-peruntukan ini adalah jelas bahawa keadilan satu-satu kes adalah paling utama dan oleh itu keperluan keterangan

A 6 k 7(2A) tidak menghilangkan budi bicara mahkamah untuk memberikan lanjutan jika adanya alasan yang baik bagi ketidak penyampaian tersebut (lihat perenggan 40–41).

(3) (oleh **Suriyadi HMR**, menyampaikan penghakiman majoriti) Perlunya untuk menunjukkan usaha yang dibuat untuk menyampaikan writ ke atas perayu di dalam A 6 k 7(2A) apabila dibaca bersama dengan A 1A KMT mestilah lebih. Oleh itu ianya menjadi kewajipan kepada responden bagi kedua-dua rayuan untuk meyakinkan setiap mahkamah bahawa mereka mempunyai alasan yang baik bagi ketidak penyampaian setiap writ mereka kepada perayu. Ini dilakukan responden dengan menunjukkan bahawa mereka terpaksa menangguhkan penyampaian writ sehingga guaman-guaman di hadapan mahkamah Singapura dihakimi bagi mengelakkan mana-mana kependuaan tindakan. Alasan yang baik telah dikemukakan oleh responden di dalam kedua-dua rayuan-rayuan A dan B yang menjustifikasikan ketidak penyampaian writ tersebut (lihat perenggan 42–43).

(4) (oleh **Suriyadi HMR**, menyampaikan penghakiman majoriti) Dalam mempertimbangkan sama ada 12 dan 13 hari kelewatan, dalam menggunakannya untuk permohonan pembaharuan pertama dan kedua di dalam rayuan B, keterlaluan dan tidak munasabah adalah penting untuk mempertimbangkan faktor-faktor seperti jarak masa kelewatan dan alasan-alasan; peluang untuk berjayanya tindakan jika permohonan dibenarkan; dan faktor prejudis kepada pihak yang terkilan jika lanjutan dibenarkan. Berkenaan dengan tiga prosiding yang berjalan serentak dan urusan yang mengelirukan berlaku ketika itu bagi responden, 12 hingga 13 hari kelewatan tidak melayakkan sebagai keterlaluan. Sebagai tambahan A 1A RHC secara statutorinya mendesak bahawa keadilan kes adalah pertimbangan yang paling utama (lihat perenggan 44–45).

(5) (oleh **Heliliah HMR**, menentang) Persoalan yang penting untuk dipertimbangkan di dalam rayuan ini adalah bila budi bicara mahkamah di bawah a 6 k 7(2) KMT untuk melanjutkan keesahan writ perlu dilaksanakan. Aturan 6 k 7(2) adalah tertakluk kepada A 6 k 7(2A) dan oleh itu mestilah permohonan yang bermasa sebelum luputnya writ sebelum budi bicara boleh dilaksanakan. Budi bicara perlu dilaksanakan apabila di hadapan mahkamah adanya satu permohonan yang dibuat sebelum luputnya writ tersebut. Jika ianya bertentangan ianya sama seperti mahkamah membenarkan pihak tersebut memfailkan permohonan untuk memintas perlaksanaan A 6 k 7(2A) di bawah perlaksanaan budi bicara yang dimaksudkan menurut s 45 Akta. Seksyen 45 tidak mengatasi peruntukan statutori spesifik yang membatasi had perlaksanaan budi bicara. Oleh itu budi bicara untuk memperbaharui writ tidak boleh digunakan apabila permohonan

itu sendiri di luar masa dan dengan mengabaikan keseluruhannya kepada keperluan statutori kedua-dua A 6 k 7(2) dan A 6 k 7(2A) (lihat perenggan 90–92).

(6) (oleh **Heliliah HMR**, menentang) Di dalam rayuan-rayuan ini, responden-responden telah dibenarkan untuk secara satu pihak sahaja tidak melakukan apa-apa usaha untuk menyampaikan writ ke atas perayu menggunakan tindakan-tindakan yang telah difailkan di Singapura sebagai alasan tidak melakukan apa juga usaha langsung. Oleh itu ini adalah satu kes tanpa usaha dalam pengabaian sepenuhnya keperluan statutori yang mana bertentangan untuk melakukan usaha dan pemfailan. Oleh itu terdapat perlaksanaan budi bicara yang pramatang bagi melanjutkan tempoh semasa permohonan sepatutnya dibuat (lihat perenggan 93).

(7) (oleh **Heliliah HMR**, menentang) Aturan 1A KMT adalah pernyataan deklarasi umum yang terkurung prinsip yang tersembunyi bahawa di dalam menjalankan keadilan seharusnya tidak mengambil peduli dan pematuhan peraturan teknikal yang kaku yang tidak menjadi pengakhiran keadilan itu sendiri. Ianya bukan tujuan satu aturan di dalam satu bahagian KMT untuk digunakan bagi menewaskan tujuan memperkenalkan A 6 k 7(2A) (lihat perenggan 103).]

Notes

For cases on extensions of writ of summons, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 8026–8029.

Cases referred to

Andre Ravindran S Arul v Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj [2004] 6 MLJ 110; [2004] 6 CLJ 226, HC (refd)

Balakerisnan a/l Varathan & Anor v Muniandy a/l Varathan & Anor [2005] 5 MLJ 380, HC (refd)

Battersby & Ors v Anglo-American Oil Co Ltd & Ors [1945] 1 KB 23, CA (folld)

CM Van Stillevoldt BV v El Carriers Inc [1983] 1 All ER 699, CA (refd)

Dagnell & Anor v JL Freedman & Co (a firm) & Ors [1993] 2 All ER 161, HL (refd)

Dato Mohamed Hashim Shamsuddin v Attorney General, Hongkong [1986] 2 MLJ 112, SC (refd)

Golden Ocean Assurance Ltd and World Mariner Shipping SA v Christopher Julian Martin & Ors (The 'Goldean Mariner') [1990] 2 Lloyds Rep 215 (refd)

Heaven v Road and Rail Wagons Ltd [1965] 2 All ER 409, HC (refd)

Kleinwort Benson Ltd v Barbak Ltd [1987] 1 AC 597, HL (refd)

Lloyd Triestino Societa v Chocolate Products (M) Sdn Bhd [1978] 2 MLJ 27, FC (refd)

Majlis Peguam & Anor v Tan Sri Dato' Mohamed Yusoff bin Mohamed [1997] 2 MLJ 271, FC (refd)
Mayban Finance Bhd v Umas Sdn Bhd & Anor [2002] 4 MLJ 276, HC (folld)
Mayhew v The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon [1991] 2 EGLR 89, CA (refd)
Motor Sports International Ltd (servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd [1996] 2 MLJ 605, CA (refd)
Norwich and Peterborough Building Society v Steed [1991] 2 All ER 880, CA (refd)
Seward v The Vera (1884) 10 App Cas 59 (refd)
Shanghai Hall Ltd v Town House Hotel Ltd [1967] 1 MLJ 223, FC (refd)
Shell Chemicals UK Ltd & Anor v Vinamul Ltd (formerly Vinyl Products Ltd) The Times 7 March 1991, 135 SJ 412, CA (refd)
Singh v Dupont Harper Foundation [1994] 2 All ER 889 (refd)
Pollock v Brooke Shepherd (1982) 45 P & CR 357, CA (refd)
Thomas v Booty Edwards & Partners [1964] MLJ 359, FC (refd)
Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678, HC (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150, FC (refd)
Veerasingham v PP [1958] MLJ 76, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 16, 16(1), 25, 25(1), 25(2), Schedule 8 para 2(3)
Interpretation Acts 1948 and 1967 ss 2(1)(e), 3, 23, 23(1), 45
Legal Profession Act 1976
Rules of the High Court 1980 O 1A, O 2, O 3 r 5, O 5 r 3(1), O 5 r 3(2), O 6 r 7, O 6 r 7(1), O 6 r 7(2), O 6 r 7(2A), O 32 r 13(2)
Rules of the Supreme Court 1957 O 8, O 8 r 1
Rules of the Supreme Court [UK] O 6 r 8, O 8 r 1, O 18 r 8(1)

Appeal from: Suit Nos MT3–22–655 of 2000 and 22–621 of 2001(S1) (High Court, Shah Alam and High Court, Kuala Lumpur) [2004] 6 MLJ 110

Mohd Shafee Abdullah (Malik Imtiaz Sarwar, Asma Mohd Yunus and Mathew Thomas Philip with him) (Abdul Raman Saad & Associates) for the appellant in Civil Suit No B-02–738 of 2006.
RR Sethu (Jeffery Wong with him) (Jeffery Wong, Noorul & Lim) for the respondent in Civil Suit No B-02–738 of 2006.
Mohd Shafee Abdullah (Malik Imtiaz Sarwar, Asma Mohd Yunus and Mathew Thomas Philip with him) (Abdul Raman Saad & Associates) for the appellant in Civil Suit No W-02–393 of 2004.
Jeffery Wong (Jeffery Wong, Noorul & Lim) for the respondent in Civil Suit No W-02–393 of 2004.

Suriyadi JCA (delivering majority judgment):

[1] This panel heard both appeals simultaneously as parties had agreed that the general principles applicable for both appeals were similar though the facts differed. It was agreed upon by parties that the court would hear Rayuan Sivil B-02–738 of 2006 ('appeal A') first. It was also agreed that the outcome would be applicable to Rayuan Sivil W-02–393of 2004 ('appeal B'). It was a fact too that at the hearing proper of appeal A at the High Court, the learned judge had relied heavily on the decision and views of the judge of appeal B. That being so a necessity arose for this panel to analyse the decision of appeal B with equal care.

[2] At the end of the hearing, by a majority decision, the two appeals were dismissed with costs by us.

[3] The facts of appeal A are as follows.

[4] On 29 September 2000, the plaintiff ('respondent') had filed two writs against the defendant ('appellant'), one at the Shah Alam High Court and one at the Supreme Court of Singapore. Both were for damages for breach of contract. They concerned the non-payment by the appellant to the respondent of remuneration in respect of work undertaken by him from 1994 to 1997. The purpose of filing similar suits founded on the same cause of action was primarily to preserve the respondent's position in the event of objections taken up on matters of jurisdiction.

[5] The Singapore suit was served on the appellant on 22 February 2001 whilst the Shah Alam case ie the current appeal A was not served on the appellant with the last date of service at best being 28 March 2001. Subsequently the Shah Alam's writ was served but not after two applications of extension of the writ were made.

[6] To appreciate the problems at hand it is quite necessary to lay down the events that took place prior to the service of the writ of the Shah Alam's case. On 12 March 2001, the appellant had applied to stay the Singapore suit. On 20 March 2001, the respondent had applied to renew the writ of the Shah Alam suit pursuant to O 6 r 7(2A) of the Rules of the High Court 1980, hereinafter merely referred to as RHC. The court exercised its discretion to renew it on 8 June 2001. The extension granted for the writ was from 28 March 2001 to 27 September 2001. On 27 April 2001, the registrar of the Singapore court stayed the Singapore suit. On 9 May 2001, the respondent appealed against the Singapore registrar's decision to the judge in chambers.

On 15 May 2001, the Singapore judge dismissed the respondent's appeal. On 18 July 2001, the respondent appealed to the Singapore Court of Appeal against the judge's decision affirming the registrar staying the Singapore suit. On 4 September 2001, the respondent applied for the second renewal of the writ in the Shah Alam suit. On 6 December 2001, the Shah Alam High Court granted the second renewal of the writ. The extension granted was from 28 August 2001 to 27 March 2002. On 18 February 2002, the Singapore Court of Appeal dismissed the respondent's appeal against the stay of the Singapore suit. On 27 March 002 the writ in the Shah Alam suit, now valid under the second renewal, was served on the appellant.

[7] After the appellant was served with the Shah Alam writ on 27 March 2002 he thereupon successfully filed an application for leave to enter conditional appearance. On 8 April 2002, he filed his conditional appearance, without prejudice to his rights to:

(i) apply to strike out the endorsement to the writ;

(ii) apply for transfer of the suit to the High Court in Johor Bahru; and

(iii) to set aside the two ex parte orders extending the validity of the writ.

[8] On 20 May 2002, the appellant filed two applications viz an application to strike out the endorsement to the writ and the statement of claim, and an application to set aside the two ex parte orders extending the validity of the writ and its purported service. At that stage the appellant had already failed to transfer the case to the High Court in Johor Bahru whilst the application to strike out the endorsement to the writ and the statement of claim was still pending.

[9] Parties had agreed that setting aside of the two ex parte orders extending the validity of the writ affecting the purported service would be resolved first. If the appellant were successful then the other applications would be academic.

[10] Back to the main stream of the antecedents, on 13 December 2002 the senior assistant registrar had dismissed the appellant's application to set aside the two ex parte orders, extending the validity of the writ and the purported service with costs. This decision was meted down despite the allegation that there was clear and blatant disregard of the rules by the respondent, what with the senior assistant registrar alleged not to have any jurisdiction to make the orders of extension. The appellant had subsequently appealed to the judge in chambers.

[11] Before the learned judicial commissioner, the appellant had ventilated that any order of extension regarding the validity of a writ, was conditional upon unsuccessful effort being made to serve the writ within one month of its issue. Such effort must be deposed in the supporting affidavit. The respondent had a simplistic approach, in that the court was empowered with discretion to grant the extension, if sufficiently good reasons existed for the non-service of the writ, regardless of the expressed rules. The non-compliance was a mere irregularity that had caused no prejudice to the appellant. The case of *Andre Ravindran S Arul v Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj* [2004] 6 MLJ 110; [2004] 6 CLJ 226 (of appeal B and to be discussed later) was referred to. The learned judge in that case Mr Justice James Foong (now JCA), despite the provisions of O 6 r 7(2) of the Rules of the High Court 1980, was of the opinion that the test to be applied for considering the extension of the writ was whether good reasons existed to excuse the delayed service. The learned judge had opined that, withholding of the service of the writ in order to avoid duplicity of action while waiting for a parallel case to be decided in Singapore, was good reason for extending the validity of the writ.

[12] In the course of perusing the evidence pertaining to the time of application of extension of the writ, and time of exercising the discretion to extend it, these facts were observed, by us, that:

(i) the first renewal application on 20 March 2001, was done *prior* to the expiry of the writ and thus did not breach O 6 r 7(2A) of the RHC. It must be understood that this provision is silent as to the time of the adjudication by the court and as such s 45 of the Interpretation Acts 1948 and 1967 comes into play;

(ii) the judge had exercised his discretion to renew it on 8 June 2001 ie *after* the expiry of the writ and thus did not breach s 45 of the Interpretation Acts 1948 and 1967;

(iii) the first extension was from 28 March 2001 to 27 September 2001. The second renewal application on 4 September 2001, which was *prior* to the expiry of the writ did not contravene O 6 r 7(2A) of the RHC too;

(iv) on 6 December 2001, *after* the expiry of the first extension the Shah Alam High Court exercised its discretion the second time. Again under s 45 of the Interpretation Acts 1948 and 1967 it was in order; and

(v) the second extension granted was from 28 August 2001 to 27 March 2002. On 27 March 002 the writ was served on the appellant on time.

[13] As the timing of the filing of the application, and exercise of the court's power to extend time were in order, the only issue left in this appeal (appeal A) for our consideration was whether, without the proof of effort the court could extend the writ twice as it did. A

[14] The facts of appeal B are as follows. B

[15] On 27 February 2001, the plaintiff hereinafter referred to as the respondent had filed a writ at the Singapore court, for payment of consultancy services purportedly rendered to the appellant. The follow up action by the defendant hereinafter referred to as the appellant was a stay application. On 30 May 2001, the appellant filed an action in the Johor Bahru High Court for a declaration that the purported consultancy services were illegal and in breach of the Legal Profession Act 1976. On 25 June 2001 the writ in the Johor Bahru action was served on the respondent. C D

[16] On 13 July 2001, the respondent filed a claim in Kuala Lumpur against the appellant. It was also for damages for breach of contract for non-payment by the latter to the respondent of consultancy fees and expenses, for work carried out in 1995 and 1996. Though the writ of summons was filed on 13 July 2001 the date inserted by the senior assistant registrar was 14 January 2001. This clerical mistake was subsequently rectified. The last day of service should have been 12 January 2002. No attempt was made to serve it on the appellant. On 12 July 2002 in Singapore, the appellant's earlier application to stay the matter there had met with failure when dismissed by the senior assistant registrar. On 20 July 2001 in Johore Baru the appellant successfully obtained judgment in default against the respondent for non-appearance. A development was observed in Singapore when on 1 August 2001 the judge in chambers there affirmed the senior assistant registrar's decision dismissing the stay. On 5 September 2001 the respondent applied to set aside the Johor Bahru default judgment (though this suit was discontinued by the appellant on 23 September 2004). On 23 January 2002, the Singapore Court of Appeal allowed the appellant's appeal and granted an order of stay. E F G

[17] On 24 January 2002, the respondent applied to extend this writ as under O 6 r 7(1) of the RHC, a writ is valid for service only for a period of six months ie from the date of issuance. It was allowed on 26 March 2002 with the first extension order being from 14 January 2002 to 13 July 2002. Despite the granting of this extended period no steps were taken by the respondent to serve the writ on the appellant. On 26 July 2002, the respondent made a second application to extend the writ, which was successful, with extension given from 14 July 2002 to 13 January 2003. H I

[18] Subsequently on 10 January 2003 the writ was served on the appellant. The latter thereafter filed conditional appearance and applied to set aside the earlier orders of extensions. Unlike appeal A the deputy registrar, after hearing arguments had allowed the appellant's application. Being dissatisfied the respondent had filed an appeal to the judge in chambers as against the deputy registrar's setting aside order. On 23 April 2004, the learned judge had allowed the respondent's appeal with costs in the cause.

[19] Before the learned judge, the appellant had contended, amongst others, that the first application by the respondent for the extension of the writ was made out of time ie after it had expired. This ran contrary to O 6 r 7(2A) of the Rules of the High Court 1980, which legislates:

> (2A) An application for renewal must be made before the expiry of the writ, ex parte by summons, supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

[20] The appellant had also submitted that the extension orders for the writ were all void ex debito justitiae, since the commencement date for the extension began from a new date rather than the continuation from the last date, before the expiry of the writ.

[21] Further the respondent had made no attempts to serve the writ on the appellant before it expired. This also breached O 6 r 7(2) of the Rules of the High Court 1980 that requires the respondent to make efforts to serve the writ before making an application for extension. This order reads:

> (2) Subject to paragraph (2A), where efforts to serve a writ on a defendant have been unsuccessful, the Court may by order extend the validity of the writ twice ... not exceeding 6 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.

[22] The respondent in response had argued that the application for extension of the writ could be made after the expiry of the writ on legal grounds (more of this later).

[23] As regards the non-action in the service of the writ, the respondent had argued that during the time of the filing of the matter in Kuala Lumpur a parallel action had been commenced in Singapore against the appellant on the same subject matter. This suit had inevitably attracted an objection founded on the preliminary issue of forum non-conveniens there with the appellant wanting the matter resolved in Malaysia. The respondent before the learned judge had submitted that the matter under appeal (appeal B) was

meant to act as a protective writ, ostensibly to preserve his cause of action, in the event the Singapore court were to rule in the appellant's favour. In order to avoid duplicity of action the service of the writ was withheld. In the meanwhile the life of the writ was continually extended until a decision was meted down by the Singapore Appeal Court. Only when matters went against the interest of the respondent was the writ served on the appellant.

[24] In the course of the appeal before us learned counsel for the appellant had made two concessions, namely that:

(i) the issue of when the correct effective date of the writ was, be it 13 July 2001 or 14 July 2001, or whether there was a break in the life of the writ, had been abandoned; and

(ii) that the appellant had no quarrel with the filing of the protective writ. (His concern was that unless efforts were made to serve that protective writ the filing of it was an abuse of the process of court. By not serving the writ the respondent had held back proceedings unilaterally).

[25] The concession as regards the filing of such protective writ at best before us, merely helped to save valuable court's time, as the law is quite clear on this matter. It allows such a course of action (see *Golden Ocean Assurance Ltd and World Mariner Shipping SA v Christopher Julian Martin & Ors (The 'Goldean Mariner')* [1990] 2 Lloyd's Rep 215 at p 219).

[26] With the preliminaries of the two concessions, namely, when the correct effective date of the writ began after its successful extension, and the acquiescence to the legitimacy of a protective writ by the appellant out of the way, I now proceed with the reasoning of our findings regarding appeal B. The appellant, in a gist, had submitted that the extension order was flawed as:

(i) the application for its extension was made after its expiry; and

(ii) prior to the writ elapsing, the respondent never made any effort to serve it on the appellant.

[27] As regards the second reason we do agree that the respondent had made no effort to serve it on the appellant. Pertaining to the time of filing the application, and the exercise of the judge's power to extend time, we found the following:

(i) the writ was filed in Kuala Lumpur on 13 July 2001 with the last date of service being 12 January 2001;

A (ii) the respondent applied to extend the life of the writ on 24 January 2002 ie *after* the expiry of the writ. By this late application O 6 r 7(2A) appears to have been contravened;

(iii) on 26 March 2002 the court exercised its discretion to extend it ie *after* the expiry of the writ. There was thus no breach of s 45 of the Interpretation Acts 1948 and 1967;

(iv) the first extension was from 14 January 2002 until 13 July 2002;

(v) on 26 July 2002 the respondent made a second application but *after* the expiry of the writ. Again O 6 r 7(2A) appears to have been contravened;

(vi) it was extended from 14 July 2002 until 13 January 2003;

(vii) obviously the application of the judge's discretion to extend the writ was made *after* the expiry period of that writ and thus did not contravene s 45 of the Interpretation Acts 1948 and 1967.

[28] Since appeal A and appeal B were heard together our additional findings were as follows:

(i) for both appeals it was an admitted fact that no efforts were made to by the respondents to serve their respective writs on the appellant. The question to be resolved thus was whether that non-adherence of statutory requirements avoided the extension orders of both appeals; and

(ii) there was late application to extend the life of the writ only in appeal B. There was nothing wrong in the judge's exercise of his powers to extend the life of the writ after the expiry date of the writ as s 45 of the Interpretation Acts 1948 and 1967 demands that. That being so we had to consider whether the delay in the application could also avoid the extension order for appeal B.

[29] Be it for appeal A or B, the respondents had gone along with the views of James Foong J (as he then was) that there were inconsistencies between O 6 r 7(2A) of the Rules of the High Court 1980 and s 45 of the Interpretation Acts 1948 and 1967. Order 6 r 7(2A) of the Rules of the High Court 1980 requires an applicant to show *efforts were made to serve the writ before making an application* for the extension of a writ. Needless to say this provision is from a subordinate legislation and would be subject to the Interpretation Acts 1948 and 1967. If there is any inconsistency in the subsidiary legislation vis-à-vis the Interpretation Act that subsidiary legislation shall be void only to the extent of that inconsistency. Section 45 of the Interpretation Acts 1948 and 1967 provides:

Construction of power to extend time

Where in any written law a time is prescribed or doing any act or taking any proceedings and powers is given to a court or other authority to extend that time, the power may be exercised by the court or authority although the *application for its exercise is not made until after the expiration of the time*.

(Emphasis added.)

[30] Under s 23(1) of the Interpretation Acts 1948 and 1967 the following has been promulgated:

Avoidance of subsidiary legislation in case of inconsistency with Act

Any subsidiary legislation which is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency

[31] Having perused O 6 r 7(2A) of the RHC and s 45 of the Interpretation Acts 1948 and 1967 I am unable to agree that there is any inconsistency between them. They have different roles to play, with those roles statutorily compartmentalised. Order 6 r 7(2A) of the Rules of the High Court 1980 merely requires any application for an extension to be made *before expiry* of the writ. It relates to the perimeters of time-constraints of an interested applicant. Whether an applicant is permitted to file an application of extension after time has expired, is well outside the purview of this procedural provision, which inevitably requires different legal treatment. Section 45 of the Interpretation Acts 1948 and 1967 on the other hand prescribes powers of courts or any other authority to extend time, with such powers exercisable *after* the expiration of the prescribed time. Whether a judge or any relevant authority may exercise that power before the expiration of the prescribed time may need another forum, though in certain circumstances and with O 1A lurking behind it can go either way. In a nutshell s 45 relates to when the court or other authority may exercise that power and nothing should be added or subtracted from it within its four walls.

[32] In the circumstances of the case s 23(1) of the Interpretation Acts 1948 and 1967 has no role to play here. Section 45 of the this Act is relevant, as it legitimises the acts of the respective courts of appeal A and B to extend time, after the expiry of the writs.

[33] I now delve into the complaint submitted by the appellant that, as no attempt was made to serve the writs prior to the extension applications, a statutory demand had not been adhered to. In essence with such a glaring flaw, the extension orders were invariably flawed as no court was entitled to act contrary to the express provisions of a statute. In reply, the respective respondent before us had repeated their arguments as submitted at the High

Court. They had ventilated that the parallel action commenced in Singapore against the appellant on the same subject matter had attracted the preliminary issue of forum non-conveniens raised by the appellant. It had required adjudication by the Singapore courts, and in order to avoid any duplicity of action, it justified the writ's non-service. They were quick to point out that the learned judicial commissioner and learned judge when allowing the respective appeals had agreed that these were good reasons for not serving the writs on the appellant. Only when the Singapore matters were resolved did a need arise to serve these writs on the appellant. And indeed they were served.

[34] With such an approach canvassed by the appellant, there is thus a necessity to revisit and direct our attention on the impugn O 6 r 7(2A) of the Rules of the High Court 1980. Historically this provision was brought in by PU(A) 342/2000 dated 21 September 2000 and compared to the pre-amendment O 6 r 7 of the Rules of the High Court 1980 an applicant now had the additional obligation to satisfy the court by way of affidavit evidence of his efforts. Bizarrely, in the United Kingdom the opposite had occurred, in that the old O 8 r 1 of the UK RSC instead had demanded that an applicant must show reasonable efforts to serve the defendant or other good reasons, in an application to extend the validity of a writ. The provision reads as follows:

> No original writ of summons shall be in force for more than 12 months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the 12 months, apply to the court or a judge for leave to renew the writ; and the court or judges *if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason*, may order that the original ... writ of summons be renewed for six months ...
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> (Emphasis added.)

[35] With the amendment, the new provision of O 6 r 8 of the UK RSC had omitted the words 'reasonable efforts to serve the defendant or other reasons'. I reproduce this provision (which is in pari material with the Malaysian old O 6 r 7 of the RHC):

> (2) Where a writ has not been served on a defendant, the court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the court before that day or such other later day (if any) as the court may allow.

[36] Comparing the amended UK provision and the Malaysian amended version it would appear that our draughtsman had done the unthinkable

when it had partially picked up something that had been discarded by the British lawmakers (see *Kleinwort Benson Ltd v Barbarak Ltd* [1987] 1 AC 597). A significant difference is that our Parliament had not seen it fit to insert the words, 'or for other good reasons'. That appears a good move to circumvent any attempts to return to the pre-amendment period or so it seems.

[37] To gauge the reasons why the United Kingdom did away with the 'effort factor' and 'other good reasons', the case of *Heaven v Road and Railway Wagons Ltd* [1965] 2 All ER 409, would be very instructive and enlightening. At p 414 Megaw J had remarked:

> What is said is this: the old RSC O 8 r 1 dealing as I have said, only with applications for renewal (as it was then called) before the expiry of the twelve months, includes the words, 'if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons', but the new RSC O 6 r 8(2) contains no such words.
>
> Assuming that I am wrong about the irrelevance of the words in the old RSC O 8 r 1 to the pre-1964 decisions on RSC O 64 r 7, I do not think that the removal of the words 'or for other good reasons' can be said to have increased the permissible scope of the distinction or to have impaired the authority of the earlier cases. That could only be the case if the court in consequence now has authority to exercise its discretion, otherwise than 'for good reasons'. That would be a remarkable proposition. No suggestion has been made, nor I think, could be made, that 'other good reasons' in the old RSC O 8 r 1 was in some way limited by some sort of application of the *ejusdem generis* rule, by reason of the collocation of that phrase with the preceding words relating to reasonable efforts to effect service. The words 'or for other good reasons', then, did not operate to limit the discretion under the old RSC O 8 r 1. Their presence could not have been material to the decisions in *Battersby*'s case or *Sheldon*'s case. Their omissions from the new RSC O 6 r 8 cannot affect the continuing authority of those cases, even if the wording of the old RSC O 8 r 1 was relevant at all to those decisions as to their discretion. *I think that the omission was probably because the words omitted added nothing and subtracted nothing. They were surplusage.*
>
> (Emphasis added.)

[38] The above view of Megaw J would certainly have been more than sufficient answer to ignore and discard the evidential requirements in our current O 6 r 7(2A) if not for the fact that the phrase 'or for other good reasons' have not been inserted. If that phrase were in, there would have been room for the judge to apply its discretion. Despite this seemingly significant difference, I am of the view that despite this omission, the power of the judge to exercise his discretion has not been totally extinguished.

[39] The reasons are as follows:

(1) *Effect of O 1A of the RHC*

[40] Order 6 r 7(2A) is not to be read in isolation but read together with O 1A and 2 of the RHC. These provisions read:

ORDER 1A

COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE

1. In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

ORDER 2

EFFECT OF NON-COMPLIANCE

1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

[41] Having considered in totality the relevancy of the above two important provisions, in particular O 1A I am of the view that as justice of a particular case is uppermost, the evidential requirements of O 6 r 7(2A) do not take away the court's discretion to grant an extension if there are good grounds for the non-service. To stick to a strict interpretation of this order would militate against the very spirit and purpose of O 1A of the RHC 1980, more so if the respondent were to have other good reasons for failing to file the extension application within the prescribed time. Casting aside elegant language, to allow justice be the prisoner of rules of procedure at every occasion, is judicially a step backward.

(2) *The evidential requirements of O 6 r 7(2A) are a surplusage*

[42] To allude to the words of Megaw J, the words, 'if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons before an application of extension is filed', are a surplusage. By that same token and reasoning, the need to show efforts having been made to serve the writ on the defendant (the appellant here) in O 6 r 7(2A) when read together with O 1A of the RHC, must be surplusage. With the omission of those words in O 6 r 7(2A) the case of *Battersby & Ors v Anglo-American Oil Co Ltd & Ors* [1945] 1 KB 23 at p 32) also considered in *Mayban Finance*

Bhd v Umas Sdn Bhd & Anor [2002] 4 MLJ 276 thus takes prominence. It now becomes incumbent on the respondents of both appeals to convince the respective courts that they have good reasons for the non-service of their respective writs on the appellant.

[43] This they did. They had discussed convincingly the necessity and justification of their protective writs. In relation to appeal B, the judge, even though had not touched on the Johor Bahru's case filed on 30 May 2001, had adequately discussed the Singapore action filed on 27 February 2001, together with their ramifications. That solitary Singapore case was more than sufficient to permit him to adjudicate as he did. The learned judge had touched on the avoidance of duplicity of action, which must, inter alia, entail avoidance of increasing costs and valuable court's time. The learned judicial commissioner in appeal A in her grounds of decision, though somewhat in a round about way, had also adopted that same reason for the non-service of the writ. The application of their discretion therefore was not an arbitrary one but a judicial act founded on excellent grounds.

[44] With the additional evidential requirements of showing efforts of serving the writ being surplusage, and discretion has been returned to judges as legislated in O 1A the next step is to deliberate whether the 12 and 13 days delay for appeal B, respectively for the first and second renewal applications were inordinate and unreasonable. To do that a need arises to appreciate the usual law in relation to an application of extension of time, and in the process of it, consider the facts raised afresh and use our own discretion. Factors for consideration in the exercise of that discretion are many. Amongst them is the length of time of the delay and reasons, the chances of success of the matter if the application was granted (why waste time on an utterly hopeless case), and the factor of prejudice to the aggrieved party, if the extension were granted (*Norwich and Peterborough Building Society v Steed* [1991] 2 All ER 880; *CM Van Stillevoldt BV v El Carriers Inc* [1983] 1 All ER 699).

[45] In the light of three proceedings running simultaneously, and the confusing state of affairs prevailing at that time for the respondent, 12 to 13 days delay certainly did not qualify as inordinate. We were not convinced either that this case was utterly hopeless or the appellant would be prejudiced by that extension. Be it by reason of O 1A of the RHC, which statutorily demands that the justice of the particular case be uppermost, or not, extensions should be granted as a matter of course unless there are exceptional circumstances that militates against it (*Thomas v Booty Edwards & Partners* [1964] MLJ 359). With nothing in the way of the application of the current respondent, it was not necessary for us to substitute the learned judge's decision, as there was nothing fundamentally wrong in his reasoning when allowing the appeal.

A **[46]** On the above prognosis and due to the similarities of principles, we likewise had dismissed appeal A. We were satisfied that good grounds had been supplied by the respondent, justifying the non-service of the writ that led to the learned judicial commissioner's decision to dismiss the appeal (*Lloyd Triestino Societa v Chocolate Products (M) Sdn Bhd* [1978] 2 MLJ 27).
B Her stance written in her judgment, albeit brief, was legally sound as reflected in the following manner:

> ... in applying and administering any of the rules and provisions of the RHC, the court has to bear in mind O 1A of the RHC, ie by having regards to the justice of the particular case ... The provisions of O 6 r 7(2) and (2A) do not take away
C the court's power and discretion to grant an extension of the writ if there is good reason for the non-service of the writ.

[47] She had found the factual grounds supplied by the appellant
D challenging the decision of the senior assistant registrar as not worthy of merit, and had further stated that there was 'good reason for the plaintiff to withhold the service of the writ and as such there is no question of the plaintiff abusing the process of the court'.

E **[48]** Based on all the above reasons by majority decision we had dismissed both appeals with costs. We also affirmed the orders of the High Court with the deposits ordered to account of taxed costs.

Heliliah JCA (delivering dissenting judgment):

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[49] Two appeals were heard together. The appeals are Rayuan Sivil No B-02–393 of 2004 and Rayuan Sivil No B-02–738 of 2006. My learned brother Suriyadi Halim Omar JCA in his draft grounds of judgment in
G respect of which I have already had the opportunity to peruse has (for ease of reference) referred to Rayuan Sivil No B-02–738 of 2006 as appeal A while Rayuan Sivil No W-02–393 of 2004 as appeal B. The two appeals have been dismissed by a majority. I have dissented for the reasons stated hereinafter.

H **[50]** The facts leading to the two appeals have been detailed by my learned brother Suriyadi Halim Omar and again for purposes of uniformity in the presentation of the facts I am adopting the facts as ably traced by my learned brother. Although the facts in appeal A differ slightly from the facts in appeal B nevertheless the main issue in both appeals pertain to the applications for
I extension of a writ made pursuant to O 6 r 7(2A) of the Rules of the High Court 1980 ("RHC"). As stated by my learned brother the parties to the appeal have agreed that the outcome of the decision in appeal A would also be applicable to appeal B. In terms of facts however it is noted that in respect of appeal B there is firstly the application to extend the life of a writ which

was itself made after its expiry and secondly prior to the writ elapsing no effort was made by the respondent to serve the writ on the appellant.

[51] The issue before us has been aptly framed by learned counsel for the respondent as follows:

> Two extensions of the writ had been granted by the court to an unserved writ, even though the application had been made after its expiry and prior to its expiry no attempt was made to serve it. The main vein of this appeal lies in the interpretation to been given to O 6 r 7 of the RHC with specific attention to be given to O 6 r 7(2A).

[52] The relevant provisions of O 6 r 7 of the RHC which should be referred to are:

> 7 Duration and renewal of writ (O 6 r 7)
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> (1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for [6] months, beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.
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> [(2) *Subject to paragraph (2A), where efforts to serve a writ on a defendant have been unsuccessful, the Court may by order* extend the validity of the writ twice (in Sabah dan Sarawak thrice and in admiralty actions 5 times), not exceeding 6 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.]
>
> [(2A) An application for renewal *must be made before the expiry of the writ*, ex parte by summons, *supported by affidavit showing that efforts have been made to serve the defendant within one month* of the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.]
>
> (3) ....
>
> (4) Where the validity of a writ is extended by order made under this rule, the order shall operate in relation to any other writ (whether original or concurrent) issued in the same action which has not been served so as to extend the validity of that other writ until the expiration of the period specified in the order.
>
> (5) A note of the renewal must be entered in the cause book.
>
> (Emphasis added.)

[53] The inception of r 7(2A) above was made with effect from 21 September 2000 vide the Rules of the High Court Amendment [PU(A) 342/2000]. There is no necessity to examine in detail any legislative history to the provisions. It would suffice however to point out that the amendment to O 6 r 7 of the RHC 1980 not only shortened the duration of the writ to six months but also introduced O 6 r 7(2A). The previous O 6 r 7(2) states:

A (2) *Where a writ has not been served on a defendant, the court may by order* extend the validity of the writ from time to time...

[54] The current provision of O 6 r 7(2) makes it subject to subrule (2A). It is normal to read the entire provisions of O 6 r 7 together and the current O 6 r 7(2) and r 7(2A) require two matters to be adhered to:

(i) *where efforts to serve a writ on the defendant have been unsuccessful*, the court may by order extend the validity of the writ not exceeding 6 months at any one time and the extension is to commence with the day next following that on which it would expire.

(ii) an application for renewal *must* be made before the expiry of the writ supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

[55] At this juncture it is appropriate to examine the judgments of the High Courts from which these appeals have lodged.

[56] For the purpose of these appeals the relevant parts of the judgment of the learned judge in appeal B which should be considered is the following:

Grounds advanced by the defendant in support of encl 23

(1) The applications by the plaintiff for extension of the life of the writ were made out of time ie after the writ has expired. This runs contrary to O 6 r 7(2A) of the Rules of the High Court (RHC) which demands that such applications must be made before the expiry of the writ.

(2) The extension orders for the writ are all void ex debito justitae since the commence date for the extension begins from a new date rather than the continuation from the last date before the writ expired.

(3) The plaintiff did not make any attempts to serve the writ on the defendant before it expired. This contradicts O 6 r 7(2) of the RHC that requires the plaintiff to make efforts to serve the writ before making an application for extension of the writ.

Analysis

First ground: application for extension made out of time

On the first ground challenging the plaintiff's for making the applications for extension after the writ has expired thereby contravening O 6 r 7(2A) of the RHC, the plaintiff counter this with s 45 of the Interpretation Acts 1948 and 1967 which provides:

Construction of power to extend time

> Where in any written law a time is prescribed for doing any act or taking any proceedings and power is given to a court or other authority to extend that time, the power may be exercised by the court or authority although the application for its exercise is not made until after the expiration of the time.

Reading this together with s 23(1) of the same Act:

> Avoidance of subsidiary legislation in case of inconsistency with Act
>
> Any subsidiary legislation which is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

The plaintiff contends that his application for extension of the writ can be made after expiry of the writ.

I agree with this proposition. Though O 6 r 7(2A) of the RHC requires application for such extension to be made before expiry of the writ but it runs contrary to s 45 of the Interpretation Acts 1948 and 1967 that allows such application to be made after the expiration of the prescribed time. And since s 23(1) of the Interpretation Acts 1948 and 1967 declares a subsidiary legislation (of which the RHC is made under such an enactment) containing inconsistent provision to be void then s 45 of the Interpretation Acts 1948 and 1967 must prevail over O 6 r 7(2A) of the RHC. With these, I find that the defendant's first contention cannot sustain.

Third ground: No attempts were made by the plaintiff to serve the writ to qualify for consideration for extension

The third accusation levied on the plaintiff is that since the plaintiff made no attempts to serve this writ then he has failed to comply with the pre-requisite set out in O 6 r 7(2) of the RHC requiring the plaintiff to make efforts to serve this writ and such service has been unsuccessful before his application can be considered.

The principle applicable in respect of this issue is extensively considered by Justice Skinner in *Mayban Finance Bhd v Umas Sdn Bhd & Anor* [2002] 4 MLJ 276 at p 287. I agree with the learned judge's view that the test to be applied for consideration for extension of the writ is 'where the court is satisfied that good reasons appear to excuse the delay in service' (see Lord Goddard in *Battersby & Ors v Anglo-American Oil Co Ltd & Ors* [1945] 1 KB 23 at p 32) rather than basing it on the mere fact that there is no attempt to serve the writ before the application for extension is made.

In this case I find there is sufficient reason to justify the plaintiff's non-action in the service of the writ. There was a parallel action commenced in the Singapore High Court by the plaintiff against the defendant on the same subject matter. But the defendant had raised a preliminary issue of forum non-conveniens. While the Singapore courts were considering this matter, the plaintiff filed this action as a protective writ, to preserve the plaintiff's cause of action in the event the Singapore courts rule in favour of the defendant and requires the plaintiff to litigate in Malaysia. The filing of such protective writ is allowed by law — see *The Goldean Mariner* [1990] 2 Lloyd's Rep 215 at p 219. For this reason the plaintiff withheld

service so as to avoid duplicity of action, and, instead, continued to extend the life of the writ until the Singapore Court of Appeal decided against him on the issue mentioned. Once that was decided, the plaintiff served this writ on the defendant. This, I consider as good reason for the delay in the service of the writ leading to there being no flaw in the extension orders of the writ.

[57] In appeal A (ie B-02–738 of 2006) the learned judicial commissioner stated the following in her grounds of judgment:

> The next and more critical issue to be determined is the scope of O 6 r 7 (2) and (2A) of the RHC and whether the SAR was correst in granting the two ex partes order extending the validity of the writ based on the grounds put forward by the plaintiff. It is not in dispute that the plaintiff has made no attempt to serve the writ on the defendant after its filing. This writ is filed as a 'protective writ' ie to preserve the plaintiff's cause of action, while waiting for the outcome of the Singapore's case.
>
> The defendant's counsel in his submission is basically asking me to give a restrictive and strict application to the provisions of O 6 r 7(2) and (2A) in that an order for extension of the validity of a writ is conditional upon unsuccessful efforts being made to serve the writ within one month of its issue and subsequently thereafter. It is submitted further that such efforts must be deposed in the supporting affidavit for the application to extent the validity of the writ. Therefore, learned counsel for the defendant submits that there is clear and blatant disregard of the rules by the plaintiff in this case and the SAR has no jurisdiction or power to make the order of extension. Several case authorities were referred to by counsel to support his contention that such non-compliance of the rules is not just an irregularity but a nullity that goes to the root of the matter.
>
> On his part the plaintiff's counsel argued that the court always has the discretion to grant the extension if there is sufficient good reason for non-service of the writ and that even if there was non-compliance of the rules, it is merely an irregularity that caused no prejudice to the defendant. There is one case law referred to by plaintiff's counsel involving the same defendant and it is *Andre Ravindran S Arul v DYAM Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj* [2004] 6 CLJ 226. In that case, Mr Justice James Foong, despite the provisions of O 6 r 7(2) of the RHC, was of the opinion that the test to be applied for considering the extension of the writ is 'where the court is satisfied that good reasons appear to excuse the delay in service'. The learned judge was of the view that withholding of the service of the writ so as to avoid duplicity of action while waiting for a parallel case to be decided in the Singapore court is considered a good reason for extending the validity of the writ. The decision of the learned judge is being appealed to the Court of Appeal.
>
> The defendant's counsel naturally disagreed with the decision in *Andre Ravindran*'s case arguing that that case completely ignores the provisions of O 6 r 7(2) and (2A) and the other decided cases in respect of this provision.
>
> I am of the opinion that in applying and administering any of the rules and provisions of the RHC, the court has to bear in mind O 1A of the RHC, ie by having regards to the justice of the particular case. As such, I am therefore incline

to agree with the observations made by Mr Justice James Foong in the *Andre Ravindran*'s case. The provisions O 6 r 7(2) and (2A) do not take away the court's power and discretion to grant an extension of the writ if there is good reason for the non-service of the writ.

There are other grounds put forward by the defendant in challenging the decision of the SAR in granting the two ex parte orders but suffice it to say that I found them without merits.

In this case I am satisfied that there is good reason for the plaintiff to withhold the service of the writ and as such there is no question of the plaintiff abusing the process of the court.

[58] Having appraised the aforementioned paragraphs in the two judgments, it is found that the issues to be addressed in this appeal are as follows:

(i) The extent (if any) to which s 23 and s 45 of the Interpretation Acts 1948 and 1967 have any effect in relation the provisions of O 6 r 7(2), 7(2A).

(ii) The scope of O 6 r 7(2), 7(2A) of the RHC.

(iii) The extent to which O 1A could be invoked in the circumstances of the case.

Issue (i): Sections 23 and 45 of the Interpretation Acts 1948 and 1967

[59] The first issue here is whether s 23 and s 45 of the Interpretation Acts 1948 and 1967 (or Act 388) have any sort of effect on the application of O 6 r 7 of the RHC 1980. The RHC 1980 were promulgated pursuant to s 16 of the Courts of Judicature Act 1964 (or 'CJA 1964' or Act 91). CJA 1964/Act 91 is a revised Act and hence by virtue of s 2(1)(e) of Act 388, Act 388 is applicable for purposes of interpretation. Section 2(1)(e) of Act 388 states:

2 (1) Subject to this section, Part I of this Act shall apply for the interpretation of and otherwise in relation to —

(a) ...

(b) ...

(c) ...

(d) ...

(e) all subsidiary legislation made after the 31st December 1968, under the laws revised under the Revision of Laws Act 1968.

[60] Section 23(1) states:

> 23 (1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

[61] As mentioned above the RHC 1980 were promulgated pursuant to s 16(1) of the CJA 1964/Act 91 which is an enabling provision which states, inter alia,:

> 16 Rules of court
>
> Rules of court may be made for the following purpose:
>
> (a) *for regulating and prescribing the procedure* (including the method of pleading) and the practice to be followed in the High Court, [the Court of Appeal and the Federal Court] in all causes and matters whatsoever in or with respect to which those Courts have for the time being jurisdiction (including the procedure and practice to be followed in the registries of those Courts), and any matters incidental to or relating to any such procedure or practice, *including* (but without prejudice to the generality of the foregoing provision) *the manner in which, and the time within which, any applications which are to be made to a High Court [to the Court of Appeal or to the Federal Court] shall be made*.
>
> (Emphasis added.)

[62] It is found that having examined the relevant limb of s 16(1) especially the parts which states '..., and the time within which any applications which are to be made to a High Court' there does not seem to be anything ultra vires about O 6 r 7(2) or r 7 (2A) for it is not inconsistent with s 16 of the CJA 1964/Act 91.

[63] Order 6 r 7(2) provides that an application for renewal *must* be made before the expiry of the writ by summons, supported by affidavit showing that *efforts have been to serve the defendant within one month of the issue of the writ* and that efforts have been made subsequent thereto ...

[64] Order 6 r 7 must be read in toto and in O 6 r 7(1) there is a duration for the validity of a writ. Again there is nothing that could be said to be contrary to s 16(1) of the CJA 1964/Act 91. In effect s 23 of Act 388 is totally inapplicable and need not be considered.

[65] It is in relation to s 45 of Act 388 that the matter is to be further considered. Section 45 of Act 388 states:

45 Where in any written law a time is prescribed for doing any act or taking any proceeding and power is given to a court or other authority to extend that time, the power may be exercised by the court or authority although the application for its exercise is not made until after the expiration of the time prescribed.

[66] This section has apparently been relied upon to enable the court to exercise its power to extend time where a time is prescribed for doing any act although the application for the exercise of the power is not made until after the expiration of the time prescribed.

[67] It is to be noted however that s 45 of Act 388 is not the only section that enables the court to exercise discretion with regard to time.

[68] Section 25 of the CJA 1964/Act 91 provides:

Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all *the powers* which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law *or rules of court relating to the same*.

[69] Item 8 of the Schedule states:

Time

Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefore be not made until after the expiration of the time prescribed.

[70] Section 25(2) as referred to above prescribes additional 'powers' as opposed to the word 'jurisdiction' in s 25(1). In addition the proviso to s 25(2) expressly states that the additional power *shall be exercised in accordance* with any written law or *rules of court* relating to the same.

[71] The expression *rules of court* means under s 3 of Act 388 the following:

'rules of court' means rule or other subsidiary legislation relating to the practice and procedure of a court or courts.

[72] The RHC is such a subsidiary legislation promulgated under s 16 of the CJA 1964/Act 91. As already stated the RHC is intra vires s 16 of the CJA 1964/Act 91 where s 23 of Act 388 for the circumstances of these appeals is entirely irrelevant.

[73] Further to be noted however is O 3 r 5 which relevant parts are as follows:

> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules or by any judgment, order or direction, to do any act in any proceedings
>
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

[74] In the light of the various provisions found under s 25 of the CJA 1964/Act 91 as well as s 16(a) of the CJA 1964/Act 91, s 45 of Act 388 is only declaratory of an existing position. Nevertheless while Act 388 is a general law the CJA is a special Act relating to courts. In my view this is an instance where the maxim *generalia specialibus non derogant* is applicable. In *Seward v The Vera* (1884) 10 App Cas 59 the Earl of Selborne LC said:

> ... where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any of a particular intention to do so.

[75] In the context of these appeals the CJA 1964/Act 91 is the earlier legislation. The legislative history of s 25 of the CJA 1964/Act 91 is already extensively traced in the judicial statements of Salleh Abas LP (as he then was) in *Dato Mohamed Hashim Shamsuddin v Attorney General, Hongkong* [1986] 2 MLJ 112 at pp 113–115. I would even add further to state that here there is not even a conflict between a general law (Act 388) and the special law (CJA 1964/Act 91). Rather with the CJA 1964/Act 91 conferring specific powers as expressly provided in s 25(2) it is this provision that has to be analysed further in examining the *power* and not the jurisdiction, of the court is relation to the abridgement or extension of time in a cause (which term in s 3 of the CJA 1964/Act 91 is defined to include any action, suit or other original proceeding between a plaintiff and defendant ...).

[76] Section 25(2) incorporates a proviso which states that the additional powers set out in the Schedule (which includes item 8) *shall* be exercised in accordance with the rules of the court relating to the same. Order 6 r 7 is thus one such rule.

[77] The word 'shall' in the context of s 25(2) indicates that it is mandatory that the additional powers are to be exercised in accordance with any rules of court. Section 25(2) has also been judicially considered in *Majlis Peguam & Anor v Tan Sri Dato' Mohamed Yusoff bin Mohamed* [1997] 2 MLJ 271, at p 287 per Mohd Azmi FCJ (as he then was):

> The relevant enacting part of s 25(2) clearly and plainly provides that 'the High Court shall have the additional powers set out in the Schedule'. We cannot imagine how such plain expression of legislative words can ever be doubted as a legislative intention to confer such powers outright. It is therefore difficult to accept that the proviso to that section is intended to provide not merely as an exception to the enacting part but to cripple it completely by imposing a blanket qualification that the court must look for another power-conferring statute, merely because the proviso requires such powers to be exercised 'in accordance with' any written law or rules of court relating thereto.
>
> It is important to observe that the proviso does not say the statutory powers are 'subject to' any written law which if it is the case may perhaps attract a condition precedent to the exercise of such powers and therefore entitling this court to conclude that the whole Schedule to the 1964 Act is merely declaratory in nature. Under the canon of statutory interpretation, it is not open to any court to substitute the phrase 'subject to' for the words 'in accordance with'. In our view, the phrase 'in accordance with' in the proviso simply refer to the mode of exercising the power and nothing more should be read into those words. Further, it is important to construe literally the word 'any' immediately preceding 'written law or rules of court'. In our opinion, what is plainly intended by Parliament is merely that the mode of exercising the powers must be in accordance with any existing written law or rules of court and not in accordance with any written law or rules to be enacted in the future. If it were the legislative intent to prohibit the exercise of the power in the absence of another statue, it would have said so in the enacting part by direct qualification, and not by way of a proviso, because the proviso should not be interpreted as a qualification which is inconsistent with what is plainly expressed in the enacting part by rendering that part practically lame and useless.
>
> Thus, the mode of exercising the power to abridge under para 8 must be in *accordance with and not contrary to existing written law or rules of court if any*. That is the only qualification or exception imposed by the proviso. In the absence of any written law or rules of court relating to shortening of time, it does not mean that in appropriate cases the additional power cannot be exercised at all. Apart from the 1964 Act itself, it is difficult to imagine if ever the legislature would find it necessary to enact separately another statute or rules relating to the abridgement or extension of time under s 15(5), apart from the existing provisions as to time in the Interpretation and General Clauses Ordinance 1948 and the Interpretation Act 1967.

A ...

In the circumstances, we disagree with Mr Robert Lazar's argument that para 8 of the Schedule to the 1964 Act is not a power-conferring but a mere declaratory provision. The general power to abridge a prescribed time must of course be exercised judicially, depending on the facts of each particular case. It also goes without saying that the general provision under para 8 cannot be invoked to defeat or supersede a mandatory requirement of any written law as to time.

Issue (ii): The scope of O 6 r 7

[78] Bearing in mind the above it is now necessary to revert to O 6 r 7(2), 7(2A). Rules 7(2) begins with the words 'Subject to paragraph (2A) where efforts to serve a writ on a defendant have been unsuccessful the court may by order extend ...'

[79] Thus even in the context of r 7(2) itself it is expressly made subject to r 7(2A) and r 7(2A) prescribes the procedure by which the application could be made. Hence the following requisites are prescribed:

(i) efforts to serve a writ on a defendant must be shown to have been unsuccessful.

(ii) the application for renewal *must be made before the expiry* of the writ.

(iii) the application must be supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have been made subsequent thereto.

[80] Further attention is to be given to word 'must'. It has to be interpreted in its ordinary meaning. In *Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678 Abdul Kadir Sulaiman J (as he then was) considered the word 'must' in the context of O 32 r 13(2) which states, inter alia:

(2) Save as otherwise provided in these rules —

(a) an affidavit intended to be used in support of an application *must* be filed and served on the other party within 14 days from the date of the filing of the application ...

[81] In his judgment he stated:

Order 32 r 13(2)(a) use an imperative word 'must'. In its ordinary meaning it is a word of absolute obligation. Therefore for the failure of the plaintiff to have the affidavit in support served upon the defendant within the time limit allowed by the rule, I would agree with the submission of learned counsel for the defendant that

in renders the said affidavit inadmissible. Order 2 r 1 of the RHC would not be of any help to the plaintiff as no reason was put forward by the plaintiff for the delay in the service of the said affidavit.

[82] The RHC and its genesis the Rules of the Supreme Court 1957 were adapted after the English Rules of the Supreme Court as they were developed, enlarged and reissued as well as replaced by the Rules of the Supreme Court 1965. Consequently in my opinion English cases are relevant in construing the word 'must'.

[83] One such case is *Shell Chemicals UK Ltd & Anor v Vinamul Ltd (formerly Vinyl Products Ltd)* The Times 7 March 1991, 135 SJ 412 (Transcript Association). It is not necessary to state the actual facts of the case. The circumstances were that there were already protracted litigation between the plaintiff and defendant and in the course of submission on a question of quantum in a claim for damage the issue arose whether the defendant was required to plead a matter in their defence and hence a further issue ensued whether the defendant might need to amend pleading. The plaintiff had countered that one of the provisions to be relied upon is O 18 r 8(1) of the English Rules. That rule, inter alia, reads:

> A party *must* in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, the expiry of the relevant period of limitation, fraud or any fact showing illegality —
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

[84] Lord Woolf in the course of his judgment in this case stated:

> Mr Slater submits that when the language of O 18 r 8(1) is looked at sub-rules (a) and (b) clearly apply to this case. The matters which the defendants now wish to rely on are ones which make a claim of the plaintiffs not maintainable, and ones which, if not specifically pleaded, might take the opposite party by surprise. Mr Slater refers to the fact that the language of the rule is mandatory. It states that 'a party must in any pleading subsequent to a statement of claim (specifically plead the matters referred to)'. He submits that it is not a matter of discretion for the learned judge, but a matter of practice laid down in the rules which establishes whether a matter has to be pleaded or not.
>
> In my judgment, Mr Slater's approach is the correct approach on an issue of this sort, subject to the qualification that there are always going to be matters of judgment involved in deciding whether or not a particular pleading fulfils the

A requirement of O 18 r 8. Speaking for myself, if a case falls within a grey area where it may be said it does or does not comply with the particular rule, the approach of this court is likely to be one which would involve the court hesitating long before interfering with a decision of a learned judge, who is responsible for trying the case. This is for the very practical reason — and this is a matter to which Mr Harvey B referred — that the learned judge who is conducting a trial, as Mr Justice Schiemann was, will normally be in a very good position to assess whether the rule is being complied with or not.

However, this case, in my view, does not fall within that sort of grey area. This case, in my view, is one where very clearly the language of O 18 r 8, required the specific C issue which the defendants wanted to rely on to be pleaded. The arguments which were advanced by Mr Harvey as to the language of r 8 in my view do not alter that clear situation. He submits that O 18 r 8(1)(a) refers primarily to claims, in other words issues as to liability rather than matters of damages Secondly, he contends that r 8(1)(b) must be construed objectively.

D Accepting for the purposes of this appeal, without deciding the matter, that that is a correct approach, in my view this does not alter the fact that both the language and the spirit of O 18 r 8(1) require an issue of this sort (which is a highly unusual issue, which involves the application of the principle of the *Mark Rowland*'s case ([1986] QB 211; [1986] 3 All ER 473) to a very different situation) to be pleaded.

E

[85] Another case which illustrates that the word 'must' has to be interpreted within its context is *Mayhew v The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon* [1991] 2 EGLR 89. Briefly the facts indicate:

F

(a) By s 1 of the Leasehold Reform Act 1967 (Encyclopedia para 2–0373), those who hold long tenancies at low rents of house (as defined) are given the right to acquire the freehold or an extended lease of the property (see also *Dymond v Arundel-Timms* above, p 397). In order to be eligible to exercise the right, the G rateable value of property must not exceed limits set out in s 1(1)(a) of the Act. By s 1(4A), a leaseholder is permitted to apply for a notional reduction of the rateable value of premises where Schedule 8 to the Housing Act 1974 applies.

Schedule 8 (Encyclopedia para 2–0715) applies to any improvement to the property made or contributed to by the tenant or any previous tenant, which is a H 'structural alteration, extension or addition'. Initially the tenant must serve a notice in the prescribed form on the landlord requiring him to agree to a reduction under the Schedule.

[86] The relevant parts of the Schedule which were considered are:

I

(b) (2) This schedule applies to any improvement made by the execution of works amounting to structural alteration, extension or addition.

2(1) The amount of any such reduction may at any time be agreed in writing between the landlord and the tenant.

(2) Where, at the expiration of a period of six weeks from the service of a notice under paragraph 1 of this Schedule any of the following matters has not been agreed in writing between the landlord and the tenant, that is to say, —

(a) whether the improvement specified in the notice is an improvement to which this Schedule applies;

(b) what works were involved in it;

(c) whether the tenant or a previous tenant under the tenancy has made it or contributed to its cost and

(d) what proportion his contribution, if any, bears to the whole cost;

the County Court may on the application of the tenant determine that matter ...

(3) An application under the last foregoing sub-paragraph must be made within six weeks from the expiration of the period mentioned therein or such longer time as the court may allow.

(c) This is a narrow but important point. The appellant's contention is simple. It is that para 2(3) provides that an application under that paragraph must be made within the time limited or such longer time as the court may allow. The provision is clearly mandatory. The respondent not having applied within the time and his application for an extension having been refused he could not thereafter make a fresh application. The Schedule permits of one try only. Any other construction makes nonsense of the mandatory time limit. If, notwithstanding that he is out of time and must obtain an extension in order to proceed, the tenant can serve a second notice the time limit becomes meaningless.

(d) Although the tenant had not applied within the time so limited the valuation officer in fact gave a certificate for a reduction in the rateable value by £50. If this was valid the value for the purposes of determining the basis of the purchase price would thus be that more favourable to this tenant. The difference between the two price bases was some £30,000.

The landlord contended that, as the tenant had failed to comply with the time limit the certificate was bad, and the higher valuation basis must therefore apply. The question went to the County Court where it was held that the timetable was mandatory but it was declared that the tenant was entitled to serve a further notice under Schedule 8. The landlord appealed. The tenant cross-appealed contending that the timetable was not mandatory.

[87] In this case the English Court of Appeal led by Parker LJ was urged to apply the decision of the Court of Appeal in *Pollock v Brooke Shepherd* (1982) 45 P & CR 357 which was submitted to be binding. Parker LJ referred to the leading judgment of Lawton LJ in the latter *Pollock*'s case who having set out the terms of para 2(3) stated:

In my judgment it is clear from para 2 of Schedule 8 that any dispute as to whether an improvement has been made must be brought within that time, that the time limit is mandatory and cannot be exceeded without the consent of the county court judge.

[88] Parker LJ also agreed with the decision of Griffiths LJ who also decided that the para 2(3) of Schedule 8 must be read as mandatory. Parker LJ stated in his own judgment:

> (e) In my judgment the ratio of both Lawton LJ and Griffiths LJ was clearly (a) that the time limits were mandatory and (b) that there could be no second application without destroying the entire structure of the Schedule.
>
> I regard the decision as binding and determinative of the issue under consideration. If I am wrong I would also conclude that there can be no second application for the reasons so cogently and succinctly expressed by Griffiths LJ. That para 2(3) is mandatory admits in my view of no contrary argument. If they are mandatory there is no room for a second notice. It is impossible to suppose that having made it mandatory to apply within the time limited or any further time permitted by the court, Parliament can have intended that the tenant could start afresh. If he could there would be no time limit at all. A tenant who was out of time would not need to apply for an extension. He could simply initiate the procedure over again. If he did apply and was refused he could do the same.

[89] While it may be that *Mayhew*'s case pertains to the interpretation of the word 'must' in the context of an Act while the issue before me in these appeals pertain to the interpretation of the word 'must' in the RHC which is regarded as subsidiary legislation I still consider that the decision in *Ting Hua Yew*'s case is also applicable and the English cases strong guidance in rendering the approach to be given in interpreting the word 'must' in the context in which it is emplaced in O 6 r 7(2A) as read with O 6 r 7(2) since the latter is to be read subject to the former. In short the word 'must' here is mandatory and not merely directory.

[90] The important question is when is the court's discretion under O 6 r 7(2) to extend the validity of writ to be exercised. As previously observed O 6 r 7(2) being subjected to O 6 r 7(2A) there *must* be a timeous application before the expiry of the writ before the discretion may be exercised. The timeous application must be made before the expiry of the writ where the affidavit supporting the application shows that efforts have made to serve the defendant within one month of the date of the issue of writ.

[91] The discretion is to be exercised when there is before the court an application made before the expiry of the writ it itself. If it were to be otherwise it would be tantamount to the court permitting the party filing the application to circumvent the effect of O 6 r 7(2A) under the purported

exercise of discretion pursuant to s 45 of Act 388. Section 45 does not overide a specific statutory provision which circumscribes the parameters of the exercise of the discretion.

[92] In these appeals it is found that both the learned High Court judge and the learned judicial commissioner went completely into the reasons for which the writs were not served without considering the preceding statutory requirement that the application *must be made before* the expiry of the writ. The discretion could not be invoked when the application is itself out of time and with complete disregard to the statutory requirements of both O 6 r 7(2) and O 6 r 7(2A).

[93] In the circumstances of this case the respondent has been permitted unilaterally to impose itself not to make any effort to have the writ served on the defendant using the actions filed in Singapore as a reason not to make *any* effort at all. It is therefore a case of non-effort in complete disregard of the statutory requirement as opposed to making efforts and failing which an application is to be made within the mandatory time frame to enable the court to exercise its discretion within the parameters described in O 6 r 7(2) and r (2A). In my view there was here a premature exercise of discretion to extend the period during which the application itself is to be made.

[94] I now come to the reasons furnished for not even attempting to serve the writs as opposed to attempts being made but that the writs could not be served. Those reasons in my view constitute the unilateral or self imposed inhibitions so as not to make any effort to have the writ served.

[95] The reasons given are that there was a protective writ filed and certain actions were filed and certain actions were filed in another jurisdiction which in the circumstances of this appeal appeared to be more of a 'wait and see' disposition.

[96] The case of *Llyod Triestino Societa v Chocolate Products (M) Sdn Bhd* [1978] 2 MLJ 27 has been cited. The decision of the Federal Court in this case is one in which the former O 8 r 1 of the Rules of the Supreme Court was being considered. It is also a case where a writ had not been served within the twelve months of the issue. An application for renewal was made within the twelve months. The statements that are relevant here in reflecting the judicial approach are to be extracted from the judgment of Chang Min Tat FJ (as he then was) as follows:

> We agree, with respect, with Lord Goddard LJ (as he then was) in *Battersby & Ors v Anglo-American Oil Co Ltd & Ors*, at pp 32–33 that:

A .... even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made ex parte. In every case care should be taken to see that the B renewal will not prejudice any right of defence then existing, and in any case it should *only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others, but ordinarily it is not a good reason that* C *the plaintiff desires to hold up the proceedings while some other case is tried or to await some future development. It is for the court and not for one of the litigants to decide whether there should be a stay, and it is not right* that people should be left in ignorance that proceedings have been taken against them if they are here to be served. While a defendant who is served with a renewed writ can, no doubt, apply for it to be set aside on the ground that there was no good reason for the D renewal, his application may very possibly come before a master or judge other than the one who made the order and who will not necessarily know the grounds on which the discretion was exercised.

E **[97]** Learned counsel for the appellant has cited *Dagnell & Anor v JL Freedman & Co (a firm) & Ors* [1993] 2 All ER 161 and *Singh v Dupont Harper Foundation* [1994] 2 All ER 889. Both cases refer to judgments where O 6 r 8 of the RSC have been considered, O 6 r 8 it is noted is not in pari materia although some similarities may be identified. In order to elucidate the F similarities O 6 r 8 is reproduced below that is follows:

RSC O 6 r 8(2)

Subject to paragraph (2A) where a writ has not been served on a defendant, the court may by order extend the validity of the writ from time to time for such G period, not exceeding 4 months of any one time, beginning with the day next following that on which it would otherwise expose, as may be specified in the order, if an application for extension is made to the court before that day or such later day (if any) as the court may allow.

RSC O 6 r 8(2A)

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Where the court is satisfied on an application under paragraph (2), that despite the making of all reasonable efforts, it may not be possible to serve the writ within 4 months, the court may, if it thinks if it, extend the validity of the writ for such period, not 12 months, as the court may specify.

I

[98] The provisions cited above differ from O 6 r 7(1)(2) and (2A) of the RHC in that in Malaysia the discretion of the writ in the first instance is six months. RSC O 6 r 8(2A) contains the words 'despite the making of all reasonable efforts'. Order 6 r 7(2A) specifies that 'efforts have been made'.

[99] It is observed that in view of these abovementioned provisions being different from O 6 r 7(2A) of the RHC the interpretation that have been rendered to the former may at best serve as general guidance. However the observation of Farquhaurson LJ is useful in indicating the approach to be taken as follows:

> RSC O 6 r 8 was intended to provide a code whereby undue delay in the service of writs is avoided. It is for this reason that the period for the validity of a writ was recently reduced from 12 months to four ...
>
> ... the following propositions should be applied:
>
> (1) Where a litigant seeks an extension of the validity of a writ the provision of RSC O 6 r 8 will apply.
>
> (2) An application under that rule *must* be made *during the validity* of the writ ie four months in the usual case, or during the four months next following ...
>
> (3) ...
>
> (4) If the litigant has not confirmed with the requirements of the rule he cannot be granted relief under O 6 r 8.
>
> (5) In exceptional circumstance and where the interest of justice so require the court will entertain an application to extend the validity of the writ under the provisions of O 2 r 1 and O 3 r 5. Before the court will extend the validity of the writ the applicant must show that there is good reason for such an extension and where appropriate provide a satisfactory explanation for the failure to apply during the period of the original validity.

[100] The above appears to be reinforced with annotations found in the *Supreme Court Practice 1997* Vol 1 at p 54:

> Paragraphs 1, 1A, 2 and 2A derive from a recommendation in the Civil Justice Review (Cm 394, paras 201 to 204 inclusive) and represent a substantial change in civil procedure. Previously a writ was valid in the first instance for 12 months, and the court had power to extend the validity of a writ for up to 12 months. The Review Body considered that these periods were 'unnecessarily long for all but special cases' ...
>
> Under para. 2 the period for which the Court may extend the validity of a writ is also reduced to a period not exceeding 4 months, and under this paragraph there is no greater period provided for writs for which leave is required for service out of the jurisdiction. Para 2A, however, provides that an extension of up to 12 months may be granted where the Court is satisfied that 'despite the making of all reasonable efforts, it may be not be possible to serve the writ within 4 months'. This provision serves to cover what the Civil Justice Review (para 201) referred to

as 'special cases', and may be resorted to where, for example, a writ has to be served in some particularly remote parts of the world; it should not be assumed to be of general application.

This rule provides a comprehensive code for the renewal of a writ, and therefore an irregularity in procedure caused by failure to renew a writ under this rule is such a fundamental defect in the proceedings that the wide powers of the Court under O 2 rr (1) and (2) to cure non-compliance with the rules ought not to be exercised by treating a writ which has become invalid for service as though it had been renewed and is therefore valid for service (*Bernstein v Jackson* [1982] 1 WLR 1982; [1982] 2 All ER 806 (CA)).

[101] Whilst having the above in mind in the circumstances being considered in these appeals I do not regard the affidavits as having explained that there were efforts to serve the writs. They are self serving in that they only choose to indicate why the writs need not be served until the respondent's matters in Singapore are resolved. The attention of this court has even been drawn to certain oral statements made in the proceedings in Singapore that a writ has been issued to be served on the appellant. This seems to be the only indication of some form of intention to conform with the requirements of O 6 r 7(2) and r 7(2A).

Issue (iii): Is O 1A relevant

[102] The third issue pertains to the exercise of discretion in invoking O 1A. Here it is clear that that the learned judicial commissioner has taken the position that the non-service of the writs constitute a mere irregularity that is curable under O 1A. It must be stated that this is not on outright power but one related to the exercise of discretion conferred by subsidiary legislation. It is the duty of the court to construe the provisions of the RHC so as to be harmonious. Neither should the interpretation render other provision redundant. Equally however could it be taken that O 1A overides the discretion that has been circumscribed in O 6 r 7(2) and O 6 r 7(2A) in that O 6 r 7(2A) indicates the requirements that must be observed before the exercise of discretion arises. On the same reasoning if the requirements of O 6 r 7(2A) have not been fulfilled does O 1A overide the former.

[103] Order 1A is again a general declaratory statement which encapsulates an underlying principle that in the dispensation of justice there should not be heedless and rigid observance of technical rules which would not serve the ends of justice itself. I do not believe that the object of one order in one part of the RHC could be utilised to defeat the object of introducing O 6 r 7(2A). The following may perhaps be cited:

> In the field of interpretation of statutes the courts always presume that the legislature inserted every part thereof with a purpose and the legislative intention is that every part of the statute should effect. Further it cannot be said that a word or words used in a statute are either unnecessary or superfluous unless there are compelling reasons to say so looking to the scheme of the statute having regard to the object and purpose sought to be achieved by it.
>
> NS Bindra: *Interpretation of Statutes*, p 669

[104] I do not believe that the aforementioned passage would not apply in respect of subsidiary legislation made under the CJA 1964/Act 91. In this context I would support the exhortatory remark made by the learned judge in *Balakerisnan a/l Varathan & Anor v Muniandy a/l Varathan & Anor* [2005] 5 MLJ 380 per Mohd Hishamudin J (at p 391):

> ... I must remark here that since the introduction of O 1A and O 2 r 3 it has come to my observation that some litigants have the tendency to regard these provisions as a licence to ignore or to treat lightly rules of procedure.

[105] It is noted here that apart from O 1A itself there is an even more specific provision as found in O 3 r 5 where again the words 'as it thinks just' (O 5 r 3(1)) and 'the court may extend' (O 5 r 3(2)) are specified. The discretion however as with all discretions must be properly exercised. *Veerasingham v Public Prosecutor* [1958] MLJ 76 at p 79.

[106] The conduct of the respondent other than alleging that the purpose of the writ was to serve as a protective measure borders on an attempt to circumvent compliance with the actual requirements of O 6 r 7 and O 6 r 7(A) to preserve its own position or even preclude the application of the limitation period.

[107] With regard to assertion of applications for stay I would agree with the statement that was reiterated by learned counsel for the appellant that the intended opposing party in litigation should not be left ignorance with a view to enabling certain steps that could be taken.

[108] I have now to address a final question that is the extent to which an appellate court could tamper or disturb the discretion that have been exercised by the judges in the High Court. The judicial proposition that establish principles of appellate interference are found to name a few in *Shanghai Hall v Town House Hotel Ltd* [1967] 1 MLJ 223, *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 and *Motor Sports International v Delcont* [1996] 2 MLJ 605. The most apt however underlying the circumstances of these two appeals are the statements of HRH Raja Azlan Shah J (as he then was) in *Shanghai Hall*'s case (at p 227):

A As a rule a court of appeal is slow to interfere with the exercise of discretion by the judge below unless there are some special circumstances such as some error of principle or misapprehension of fact on his part or giving undue weight to a particular aspect of the facts. It is sufficient to refer in this connection to *Gordon v Craddock* and to quote the words of Willner J:

B

> It appears to me that the question what terms ought to be imposed on a defendant as a condition of giving him leave to defend is very much a matter of discretion for the judge. That being so, this court is naturally reluctant to interfere with the exercise of discretion by the judge below unless it can be shown that there has been some error of principle on his part, or that he has in
C some way misapprehended the facts or has given undue weight to thus or that aspect of the facts.

[109] Applying the principle to the present appeals I come to the
D conclusion that there has been an error in the form of a misconceived exercise of discretion. There is an error in not having due regard to the non-compliance by the respondent to the requirements of O 6 r 7(2), O 6 r 7(2A) as traced above. In the final analysis the two appeals are therefore to be allowed. The orders therefore are to be as follows:

E

In appeal A Rayuan Sivil No B-02–738 of 2006

[110] Appeal allowed with costs here and below. The orders of the senior assistant registrar dated 8 June 2001 and 6 December 2001 are to be set aside
F and consequently the service of the Shah Alam writ be set aside.

In appeal B Rayuan Sivil No W-02–393 of 2004

[111] Appeal allowed with costs here and below. The orders of the senior
G assistant registrar dated 26 March 2002 and 26 March 2002 are to be set aside. Consequently the service of the Kuala Lumpur writ is to be set aside.

Appeals dismissed with costs.

H

Reported by K Nesan

I